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IN THE

Supreme Court of the United States

October Term, 1962

No. 455

FAYE LYONS,
Petitioner,

vs.

ELSINORE C. MACHRIS GILLILAND, also known as ELSINORE MACHRIS GILLILAND
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE EARL WARREN AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254(1), U.S. Codes; 62 Stats. 926. The judgment of the United States Court of Appeals was rendered

June 1, 1962. On petition for rehearing, duly and regularly filed, the petition for rehearing was denied June 28, 1962. Petition for certiorari is filed within 90 days after the denial of said petition for rehearing.

OPINIONS BELOW

The opinion of the Court of Appeals is recorded in *Lyons v. Gilliland,* 303 F. 2d 452. A previous decision in the same case was affirmed in *Gilliland v. Lyons,* 278 F. 2d 56.

STATUTES INVOLVED

United States Constitution, Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28, Section 1254(1), U.S. Codes:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

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Section 45, Civil Code of California:

Libel, What. Libel is a false and unprivileged publication by writing, printing, picture, effigy or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

Section 47, Civil Code of California:

Privileged publication or broadcast.

A privileged publication or broadcast is one made —

1. In the proper discharge of an official duty.

2. In any (1) legislative or (2) judicial proceedings, or (3) in any other official proceeding authorized by law; provided, that an allegation or averment contained in any pleading or affidavit filed in an action for divorce or an action prosecuted under Section 137 of this code made of or concerning a person by or against whom no affirmative relief is prayed in such action shall not be a privileged publication or broadcast as to the person making said allegation or averment within the meaning of this section unless such pleading be verified or affidavit sworn to, and be made without malice, by one having reasonable and probable cause for believing the truth of such allegation or averment and unless such allegation or averment be material and relevant to the issues in such action.

Section 48, Civil Code of California:

Privileged publication or broadcast; malice not inferred.

In the case provided for in subdivision 3 of the preceding section, malice is not inferred from the communication.

STATEMENT OF THE CASE

QUESTIONS PRESENTED

1. Where a woman is libeled in a State divorce action in the State of California by being falsely charged with adultery in the suit filed in the State court, can she be denied damages in a federal court in a diversity of citizenship case where the charge of adultery in the State divorce action is found to be false, but further found to be privileged on information which was claimed to have been received subsequent to the filing of the libelous document?

2. Whether the person who commits the libel is bound by her knowledge or lack of knowledge at the time of the false publication in the divorce action.

3. Whether the person committing the libel can rely on information or statements or beliefs unknown to her at the time of and prior to the commission of the libel but was only acquired subsequent thereto.

4. Whether the law of the State of California which provides that in an action for divorce allegations of adultery are not privileged communications as to

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the person making such allegation unless made without malice by one having reasonable and probable cause for believing the truth of such allegations at the time of making it and publishing it governs this case.

5. Whether a decision of a U.S. Court of Appeals, in affirming an order in this case granting a new trial after a first trial, became the law of the case so that in the second trial of the action in the district court, the district court and jury are bound by it.

6. Whether the rule of *Erie v. Tompkins,* 304 U.S. 64, 82 L.ed. 1188, is binding in this case and requires the federal court to apply the law of the State of California as construed by the highest courts of that State.

Davis v. Hearst, 160 Cal. 143;
Koenigstein v. Koenigstein, 53 Cal. App. 673;
Hartshorn v. Hartshorn, 67 Okla. 45;
State v. Eggleston, 45 Ore. 346;
Wilson v. Wilson, 124 Cal. App. 655.

7. Whether a plaintiff who has been falsely charged with adultery in a divorce action is denied due process of law and the equal protection of the laws guaranteed by the 14th Amendment to the U.S. Constitution in a diversity suit brought in a federal court where there is a finding that the accusation of adultery was false but nevertheless that it was privileged.

8. Whether section 47 of the Civil Code of the State of California, inherently and as construed and applied in this case, violates due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

9. When privilege is pleaded as a defense in a libel action are matters unknown to the libellant at the time of the libel available as evidence to sustain the burden of proving probable cause or must proof of probable cause consist only of matters known to the libellant at the time of the libel.

10. Whether a decision of a Court of Appeals, based upon erroneous statements of fact, must be reviewed by this Court where the matters and purported quotations in the decision are not based upon a correct reading of the record or the facts produced at the trial.

11. Whether this Court should review a decision of a court of appeals where the court of appeals has acted under a mistake of fact and has refused and declined to correct its decision based upon those erroneous facts.

Defendant Elsinore Machris Gilliland, a wealthy oil heiress and owner of several oil wells in Southern California, sued her much younger husband for divorce in the Superior Court of the State of California. In the action she charged Faye Lyons, a resident of Florida, with adultery. The record in the case discloses that at the time of the making of the allegations and the filing of the divorce action, she had no information justifying her in making this false allegation. The case was tried before a jury and a verdict was rendered in favor of the defendant, but the trial judge granted a motion for a new trial from this verdict. Thereafter the defendant pleaded truth and privilege as her defenses in the action, and a second trial was held.

In the first appeal, in which there was a complete record before the Court of Appeals, the Court of Appeals stated, in affirming the order granting a new trial (*Gilliland v. Lyons,* 278 F. 2d 56),

> "The ultimate basis for the order granting the new trial then would be the lack of sufficient evidence to establish good faith and lack of malice as required by the statute."

The statute referred to was section 47 of the Civil Code of California. On the retrial the issues of truth and privilege were placed before the jury. The jury found the libelous statement untrue but it also found that it was privileged. The same evidence on the ques-

tion of privilege was given on both trials. The second judgment was affirmed on appeal by a different panel of the circuit court of appeal, the decision holding that the same evidence which would not support a defense of privilege on the first appeal would support the same defense on the second appeal. The second learned panel, in citing the decision incorrectly purports to quote from a statement of Blanche Lampert. (Plaintiff's Exhibit 1.) The quotation is not contained, however, in the statement as quoted. The affirmance of the judgment is therefore incorrectly based upon this misstatement of facts, as the record shows that the defendant was not aware of these facts at the time of swearing to the complaint and filing the libelous action. The court of appeals, therefore, affirmed the judgment in the second case based upon a misstatement of fact and a misstatement of the record. The court is asked to grant certiorari to correct such mistake as well as a conflict in the opinions of two branches of the same court.

REASONS FOR GRANTING THE WRIT

1. The case is at variance with the law of the State of California which holds that only matters known to a libellant at the time of the libel are available on the defense of privilege.

Davis v. Hearst, 160 Cal. 143;
Koenigstein v. Koenigstein, 53 Cal. App. 673;
Hartshorn v. Hartshorn, 67 Okla. 45;
State v. Eggleston, 45 Ore. 346;
Wilson v. Wilson, 124 Cal. App. 655.

The Court of Appeals in its later decision holds that the matters learned later and after the libel was filed are available to her as a defense and this is contrary to the law of the State of California and the law generally.

2. This case is at variance with established law that proof of adultery by inference cannot be shown except by proof of opportunity and proof of propensity on the part of *both* parties to commit the act. The Court of Appeals, in conflict with the law of the State of California and in conflict with general law, erroneously holds that proof of propensity by one only of the parties, plus opportunity, will support a legal inference of adultery. This establishes a new and unique rule contrary to the law of the State of California and destroys the normal protection of the law to the innocent who would be subject to such false accusation.

3. Where a court acts under a mistake of fact, a higher court will review it and correct the same or will recall the remittitur or mandate so that justice may be done. (*People v. Rothrock,* 14 Cal. 2d 34) This case should be reviewed so as to correct the mistake of misquoting documents which form the justification and support of the decision and make it erroneous. This Court will not permit a decision to stand which is based upon statements which purport to be facts but which are incorrect. The rule that proof of adultery by inference can only be shown by (1) proof of opportunity and (2) proof of propensity on the part of both parties is held in the following cases:

Davis v. Hearst, 160 Cal. 143;
Koenigstein v. Koenigstein, 53 Cal. App. 673;
Hartshorn v. Hartshorn, 67 Okla. 45;
State v. Eggleston, 45 Ore. 346;
Wilson v. Wilson 124 Cal. App. 655.

As evidence of how the court of appeals acted under a mistake of fact and that the decision is based upon such a mistake of fact, we respectfully point to the following language in the decision of the court of appeals. That decision purports to quote from the Blanche Lampert statement, a sworn statement of a witness called on behalf of the defendant, which is as follows:

> "Stayed with appellant all night at the Paradise Valley Guest Ranch."

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The words of the statement were as follows:

> "Stayed at Paradise Valley Guest Ranch when appellant was there."

Surely if some Justice stayed at a guest ranch when some woman or women were there it would not constitute staying with them and this glaring mistake of fact is set forth in support of the opinion of the court of appeals.

A virtuous woman may stay in a certain hotel while a known lecher is also a guest in the same hotel. These facts do not justify the libel that the virtuous woman stayed with the lecherous individual in a certain hotel.

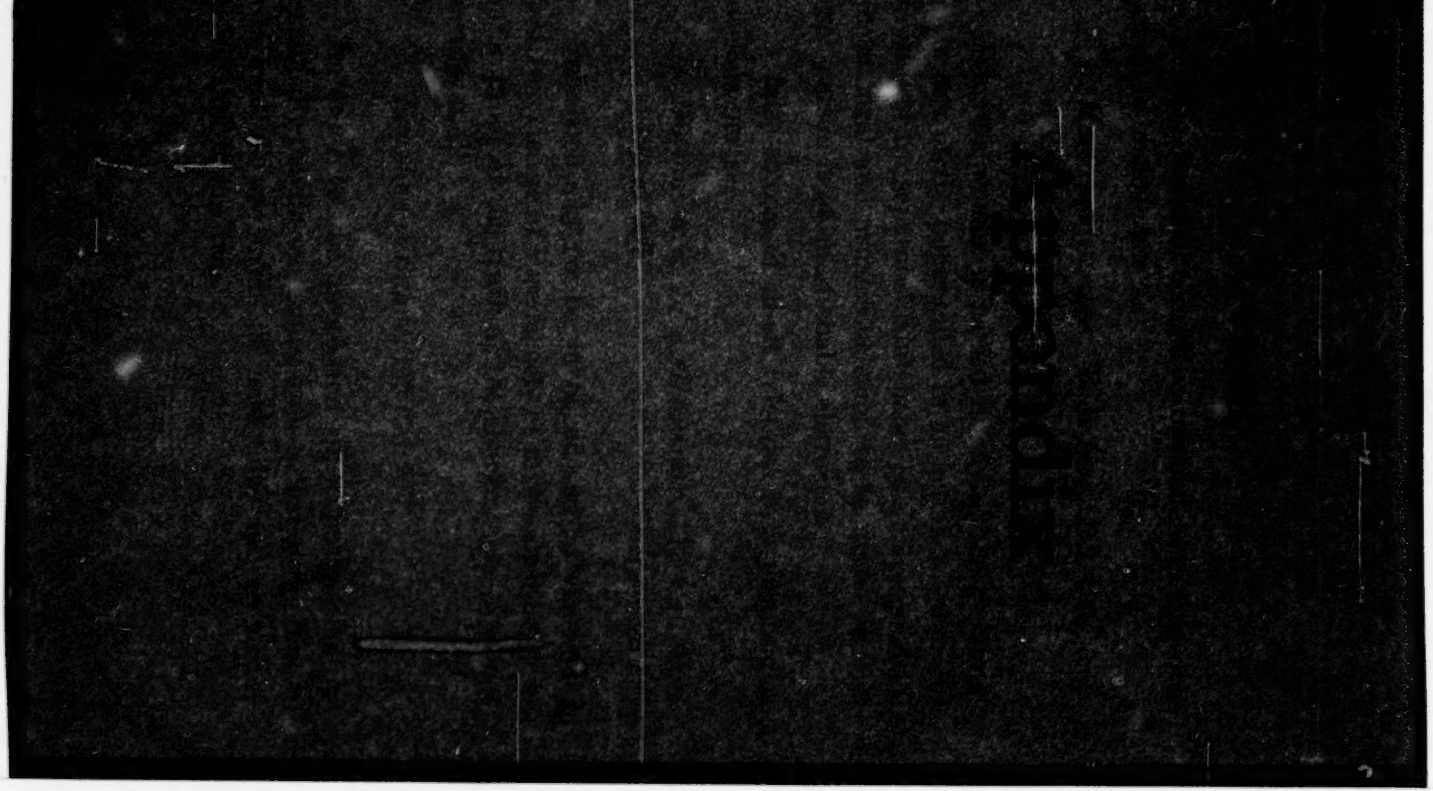
Three times in the decision of the court of appeals there is quoted evidence which was not known to the libellant at the time of the libel and this evidence, not known to the libellant at the time of the libel, is quoted as a basis for and in support of its decision on the issue of privilege. This is all in violation of established law and should be corrected by this Honorable Court under its doctrine of *Erie v. Tompkins,* 304 US 64, 82 L.ed. 1188. Section 47 of the Civil Code of California, inherently and as construed and applied in this case, would violate both due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States if it was allowed to deny damages on the basis of privilege in the federal court to one who had been

falsely accused of adultery in a divorce action by one having no basis for the accusation at the time it is made. Such a decision should not be allowed to stand.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of the Court, directed to the United States Court of Appeals for the Ninth Circuit, to reverse the case and remand the same solely for determination of the damages done to the libellant and for such other and further relief in the premises as may seem just and meet.

Respectfully submitted,

MORRIS LAVINE and
WELBURN MAYOCK
Attorneys for Petitioner



APPENDIX

A false charge of being a co-respondent in a divorce action is libelous per se.

Mortonsen v. L.A. Examiner, 112 Cal. App. 196 at 207

Where a woman is named in any of the pleadings or in any of the papers filed in an action whether for divorce or for separate maintenance as a co-respondent, the natural and usual conclusion to be drawn is that such person is of questionable character.

A false charge of illicit relations in a pleading is libelous per se.

Mortonsen v. L. A. Examiner, 112 Cal. App. 196 at 207

Falsehood may not be published and he who would justify a charge of specific acts of misconduct must do so by proof of the truth of the charge or he does not justify at all.

Dauphny v. Buhne, 153 Cal. 757

In order to the protection of a publication as qualifiedly privileged it must appear that at the time it was made it was made in good faith and in honest belief that it was true.

Swan v. Tappan, 5 Cushing (Mass.) 104;
Gossett v. Gilbert, 6 Gray (Mass.) 94;
Clink v. Colby, 46 N.Y. 427, 7 Amer. Rep. 360;
Quinn v. Scott, 22 Minn. 456.

Whatever a man publishes, he publishes at his peril.

Peck v. Tribune Co., 214 U.S. 189, 53 L. ed. 960;
Washington Post Co. v. Chaloner, 250 U.S. 293.

A person can never escape liability for making an untrue defamatory statement of another with malice and without probable cause.

Where one seeking a divorce names another person as the alleged paramour of her husband, the circumstances surrounding it lead to the inference of malice and lack of good faith at the time of the publication.

Faye LYONS, Appellant,

v.

Elsinore C. Machris GILLILAND, also known as Elsinore Machris Gilliland, Appellee.

No. 17362.

United States Court of Appeals
Ninth Circuit
June 1, 1962.

Rehearing Denied July 9, 1962.

Action for libel. The United States District Court for the Southern District of California, Central Division, William C. Mathes, J., entered a judgment for the defendant and the plaintiff appealed. The Court of Appeals held that where a libelous per se charge was made against plaintiff by defendant in her divorce action and evidence sustained jury findings that defendant had acted without malice and had reasonable and probable cause for believing truth of relevant allegations, words which were published only in a judicial proceeding were privileged.

Affirmed.

1. Libel and Slander 7(17)

Publication charging that plaintiff committed acts of adultery with another was libelous per se.

2. Libel and Slander 112(2)

Evidence supported jury finding that defendant's charge of adultery, made in divorce proceeding, was without malice.

3. Courts 406.3(5)
Federal Civil Procedure 2651

Jury finding is binding on trial court and appellate court unless there is no substantial evidence, whether contradicted or not, to support verdict.

4. Libel and Slander 112(2)

Evidence sustained jury finding that defendant had probable cause to believe truth of her allegation in divorce action that her then husband had committed adultery with plaintiff.

5. Libel and Slander 38(3)

Where libelous per se charge was made against plaintiff by defendant in her divorce action and evidence sustained jury findings that defendant had acted without malice and had reasonable and probable cause for believing truth of relevant allegation, words which were published only in a judicial proceeding were privileged. *West's Ann.Cal.Civ.Code* §47, subd. 2.

Welburn, Mayock and W. S. Mayock, Los Angeles, Cal., for appellant.

Charles W. Wolfe and George R. Larwill, Los Angeles, Cal., for appellee.

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Before BARNES, HAMLEY and BROWNING, Circuit Judges.

PER CURIAM.

This is an appeal by plaintiff in a diversity action for libel from a judgment based on a jury verdict, holding that the libel charged was untrue, but that its publication was privileged.

[1] The libel charged appellant with acts of adultery committed with appellee's then husband. The words were libelous per se, and their publication admitted in a cross-complaint in a divorce action. Their alleged privilege rests upon their publication *only* in a judicial proceeding. Section 47 of the Civil Code of California reads, in pertinent part, as follows:

"47. [Privileged publication * * *: What constitutes]

"A privileged publication * * * is one made— * * *

2. In any * * * judicial proceeding * * *; provided, that an allegation or averment contained in any pleading * * * in an action for divorce * * * made of or concerning a person by or against whom no affirmative relief is prayed in such action shall not be a privileged publication * * * as to the person making said allegation or averment within the meaning of this section unless such pleading be verified * * * and be made without malice, by one having reasonable and probable cause for believing the truth of such allegation * * * and unless such allegation * * * be material and relevant to the issues in such action. * * * "

Materiality and relevancy are undisputed. Appellant's real thrust on this appeal is that there was insufficient evidence that appellee acted without malice, or had reasonable and probable cause for believing the truth of the allegations.

[2, 3] Appellee testified she acted without malice. Appellant argues that wronged wives seldom admit, but almost universally have, "hatred, jealousy and even vindictiveness" against the other woman. This may well be true. If so, it presented a conflict in the evidence. That conflict was for a jury's determination, and solely for a jury's determination. That determination has been made and under well known legal rules is binding on the trial court, and on this court, unless there is *no* substantial evidence, whether contradicted or not, to support the jury verdict. Such a total lack of evidence does not exist in the facts of this case.

We next consider the alleged lack of probable cause for appellee to believe the truth of her allegations. Only evidence known by appellee at the time of publication can be now considered.

When she filed her cross-complaint, Mrs. Gilliland knew the contents of the so-called Lambert statement, plus what her attorney, Mr. Murphey, knew,[1] plus, perhaps, a little the neighbors told her. The appellee filed

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[1]Mrs. Lambert stated at the trial she had given Mr. Murphey a sworn statement "of the girls who stayed there and what they did, the same as I gave on the stand." (Tr. p. 235.)

her cross-complaint alleging adultery only after receiving her attorney's advice that she had sufficient evi dence to charge adultery.

We need not go into all the details here; a few suffice. Mrs. Lambert referred to Mr. Gilliland's "keeping" appellant (a twice married adult) at Paradise Valley Motel; "staying all night up there himself"; appellant coming to Mr. Gilliland's home and staying until two or three o'clock in the morning; their drinking together; that the two kissed on several occasions before Mrs. Lambert; that appellant and Mr. Gilliland took a ten day automobile trip from Scottsdale, Arizona, to Miami, Florida, together; and that on the one occasion Mr. Gilliland "stayed with appellant all night at the Paradise Valley Guest Ranch" Mrs. Lambert saw Mr. Gilliland leave Faye Lyons' room at 7:45 A.M. the next morning.

Of lesser importance, but to set the stage for the foregoing, there was evidence of drinking, arguments, quarreling and fighting, and on at least one occasion, articles being thrown. Mrs. Gilliland knew of her husband's boast of his conquests of other women; and that he had variously entertained other women — one for three weeks as a house guest.

[4, 5] Under these circumstances, we cannot say, as a matter of law, there was an absolute lack of substantial evidence from which the jury might not have concluded that Mrs. Gilliland was justified in inferring

and charging her husband in a court of law of adultery committed with Faye Lyons, or that such a conclusion had no legal basis in fact.

Affirmed.

Elsinore M. Machris GILLILAND, also known as Elsinore Machris Gilliland, Appellant,

v.

Faye LYONS, Appellee.

No. 16385.

United States Court of Appeals
Ninth Circuit.
April 11, 1960.

Defamation action. After making findings adverse to the plaintiff on all three causes, the United States District Court for the Southern District of California, Central Division, William C. Mathes, J., granted a new trial to plaintiff on one of the causes and the defendant appealed. The Court of Appeals, Koelsch, Circuit Judge, held that where plaintiff timely filed a motion for new trial within ten-day period provided by rules and court granted motion after ten-day period without specifying reasons therefor other than that plaintiff's motion was granted, under the circumstances, court had jurisdiction to issue order and it was not appealable.

Appeal dismissed.

1. Courts 405(12.17)

As general rule, order granting motion for new trial is not appealable because it is not "final" within meaning of statute giving Courts of Appeals jurisdiction of appeals from final decisions, but it is interlocutory. 28 U.S.C.A. § 1291.

2. Courts 406.1(12)

Rule that order granting new trial can be reviewed on appeal from subsequent judgment exists but rule is not unqualified and trial court must have had jurisdiction to make order for it to be reviewable. 28 U.S.C.A. § 1291.

3. Federal Civil Procedure 2376

If trial court lacked jurisdiction to make order granting new trial, in doing so it acted without power and was incapable of destroying finality of its own judgment. 28 U.S.C.A. § 1291; Fed. Rules Civ. Proc. rule 59(d), 28 U.S.C.A.

4. Courts 405(3.15)

Where motion for new trial is made within 10-day period required by rules and is granted, it is not appealable, even though order granting it is issued subsequent to that period, but conversely when order granting new trial is issued by trial court on its own initiative after ten-day period has run, the order is appealable. 28 U.S.C.A. § 1291; Fed. Rules Civ.Proc. rule 59(d), 28 U.S.C.A.

5. Federal Civil Procedure 2368

As a general rule, no reasons for granting new trial are required but grounds are obtained from those stated in motion itself. Fed.Rules Civ.Proc. rule 59(b, d), 28 U.S.C.A.

6. Courts 405 (3.15)

Where plaintiff against whom findings were made on all three of her causes in defamation suit timely filed a motion for new trial within ten-day period provided by rules and court granted motion after ten-day period without specifying reasons therefor other than plaintiff's motion was granted, under the circumstances, court had jurisdiction to issue order and it was not appealable. 28 U.S.C.A. §§ 1291, 1332; Fed.Rules Civ.Proc. rules 7(b), 59(b, d), 28 U.S.C.A.; West's Ann.Cal.Civ.Code, § 47, subd. 2. (2, 3).

Wm. L. Murphey, John B. Anson, Charles Wolfe, Los Angeles, Cal., for appellant.

Welburn Mayock, Morris Lavine, Los Angeles, Cal., for appellee.

Before STEPHENS, BARNES and KOELSCH, Circuit Judges.

KOELSCH, Circuit Judge.

Appellee filed an amended complaint on November 20, 1956, in the United States District Court stating three separate causes of action. The ground as to each cause of action was, in substance, as follows: number

one, that appellant had published false, malicious and slanderous statements concerning appellee's adulterous relationship with appellant's husband; number 2, that appellant had falsely and maliciously published a verified cross-complaint on November 26, 1955, in a divorce proceeding against her husband charging appellee with adultery; and number 3, that appellant had caused a newspaper article to be published on March 23, 1956, reciting the allegations in the above complaint. Appellant's answer, in addition to denying the above allegations, set up an affirmative defense of truth as to the first and third causes of action, and an affirmative defense of privilege as to the second cause of action.

The District Court, sitting without a jury, entered Findings of Fact and Conclusions of Law favorable to appellant on all three causes of action. The court ruled, however, that since appellant did not raise the "specific defense" of truth in the second cause of action, no finding would be made in regard thereto. Judgment for appellant was entered on June 17, 1958. Appellee filed a timely motion for a new trial on June 24, 1958. The grounds for this motion were as follows:

"I

"Irregularity in the Pre-Trial Proceedings by the elimination of 'truth' as to the slanders and libels from the case when 'falsity' had been pleaded by the plaintiff and denied by the defendant;

"II

"Accident at the trial in the failure by inadvertence and excusable neglect on the part of the plaintiff's attorney to introduce defendant's deposition in evidence;

"III

"Insufficiency of the evidence to justify the decision. The following specifications are urged:

* * * * * * * *

"D. Finding VII [regarding the second cause of action] is opposed to the weight of substantial and probative evidence in that there is no evidence * * * to support the finding that she acted in 'good faith' and 'without malice' and reasonably believed the allegations were true * * * "

Thereafter, on September 30, 1958, the Court granted the motion in part by the following order:

"It is Ordered that plaintiff's motion for a new trial is hereby granted as to plaintiff's second claim or cause of action only, and that in all other respects the motion for a new trial is hereby denied. See: Cal.Civ.Code Sec. 47-2(3); *Davis v. Hearst*, 1911, 160 Cal. 143, 195, 116 P. 530, 552; *Tingley v. Times Mirror Co.*, 1907, 151 Cal. 1, 26, 89 P. 1097, 1107."

The present appeal is taken from the above order. Jurisdiction of the District Court was based on diversity of citizenship under 28 U.S.C. § 1332. Whether this court has jurisdiction is the determinative and controlling question in this appeal.

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Appellee contends that an order granting a motion for a new trial is not appealable under 28 U.S.C. § 1291, and that therefore this court is without jurisdiction to decide the matter. Appellant argues that the lower court had no jurisdiction to issue the order because it was made on the court's own initiative and not within the requisite ten-day period prescribed by Rule 59(d), Federal Rules of Civil Procedure, 28 U.S.C.[1] Appellant then urges that such orders, because lacking in necessary jurisdictional power, are appealable.

[1, 2] As a general rule, an order granting a motion for a new trial is not appealable because it is not a "final" order under 28 U.S.C. § 1291. *Phillips v. Negley,* 1886, 117 U.S. 665, 6 S.Ct. 901, 29 L.Ed. 1013; *Long v. Davis,* 9 Cir., 1948, 169 F.2d 982. The order is interlocutory since it destroys the finality of the judgment and there is no "final decision" from which an appeal will lie. *Libby, McNeill & Libby v. Malmskold,* 9 Cir., 1940, 115 F.2d 786. The order granting a new trial can be "reviewed" on an appeal from a subsequent judgment. *Pettingill v. Fuller,* 2 Cir. 1939, 107 F.2d 933; *United States v. Hayes,* 9 Cir., 1944, 172 F.2d 677.

[3] However, this rule is not unqualified: the trial court must have had jurisdiction to make the order; if not, it was acting without power and was therefore in-

[1]Rule 59(d), Federal Rules of Civil Procedure, provides as follows:

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor."

capable of destroying the finality of its own judgment. *Freid v. McGrath,* 1942, 76 U.S. App. D.C. 388, 133 F. 2d 350; *Kanatser v. Chrysler Corp.,* 10 Cir., 1952, 199 F. 2d 610. An order made without jurisdiction is considered final and appealable:

> "An order granting or refusing a new trial, which the court has the jurisdiction or power to make, is discretionary, and cannot be reviewed. * * * But the question whether or not the court had the jurisdiction or power to make an order granting or refusing a new trial and avoiding a former judgment is always reviewable in the federal courts * * * because it goes to the effect and finality of the judgment itself. *City of Manning v. German Insurance Co.,* 8 Cir., 1901, 107 F. 52, 54."

[4] It is clear, therefore, that when a motion for a new trial is made within the ten-day period required under Rule 59(b),[2] and the motion is granted, it is not appealable even though the order granting it is issued subsequent to that period. *Citizens National Bank of Lubbock v. Speer,* 5 Cir., 1955, 220 F.2d 889. Conversely, when an order granting a new trial is issued by the court on its own initiative after the ten-day period has run under Rule 59(d), the order is appealable. *Freid v. McGrath,* supra; *Phillips v. Negley,* supra. The problem arises, however, where a timely motion is filed,

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[2]Rule 59(b), Federal Rules of Civil Procedure, provides as follows:

"(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment."

and the court grants the motion after the ten-day period on a ground not stated therein. In those appellate courts where the question has arisen, the order has been construed to arise from the court's own initiative, without jurisdiction, and therefore appealable. *Freid v. McGrath,* supra; *Marshall's U. S. Auto Supply v. Cashman,* 10 Cir., 1940, 111 F.2d 140; *National Farmers Union Auto & Cas. Co v. Wood,* 10 Cir., 1953, 207 F. 2d 659.[3]

[5, 6] Our primary inquiry, then, is whether the lower court's order was made on grounds stated in the motion or on its own initiative. The order, quoted above, does not specify any reasons for granting a new trial other than "* * * plaintiff's motion for a new trial is hereby granted * * *." As a general rule, no reasons are required; the grounds for the motion are obtained from those stated in the motion itself.[4] The above language alone would be sufficient to establish the lower court's jurisdiction as based upon appellee's motion rather than the court's own initiative. In

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3. This court has not as yet passed on the question. See *Southern Pac. Co. v. United States District Court,* 9 Cir., 1951, 190 F.2d 735; *Grimm v. California Spray-Chemical Corp.,* 9 Cir., 1959, 264 F.2d 145. However, Prof. Moore, in his work on Federal Practice, disagrees with the rationale in *Freid v. McGrath, supra,* on the ground that "* * * once finality has been suspended, there is nothing in the policy underlying Rule 59(d) to prevent the trial court from exercising its discretion to grant the motion on grounds which it deems just." Moore, Federal Practice, Vol. 6, §5909 (2).

4Rule 7(b), Federal Rules of Civil Procedure, requires that motions made after the trial must be in writing and state with particularity the grounds therefor. When the motion is granted under Rule 59 (b), supra, note 2, no grounds are required by the rule. However, if a new trial is ordered under Rule 59(d), supra, note 1, the court must specify its reasons because it is on the court's own initiative.

Southern Pac. Co. v. United States District Court, 9 Cir., 1951, 190 F.2d 735, 737, this court stated as follows:

> "Indeed, the order granting a new trial, refers specifically to 'plaintiff's motion for a new trial.' The presumption that official action was regularly performed would seem to require us to resolve any possible ambiguity in the order in favor of a holding that the court acted upon [the] motion, with respect to which it still had jurisdiction to act."

However, appellant contends that the cases and statute cited after the written words in the order are concerned solely with the inadmissibility of truth in a trial under California law, where truth was not pleaded as a defense. It is then argued that since the admissibility of truth was not questioned or raised in the motion for a new trial, the court was acting on its own initiative and was therefore without jurisdiction.[5]

The statute cited in the order, California Civil Code Section 47, Subdiv. 2(3), delineates the necessary elements of privilege as a defense where defamatory allgations are made in a judicial proceeding.[6] No reason

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[5]Appellee did urge in her motion that the question of falsity should have been included by the pleadings as an issue in the second cause of action, requiring a finding as to truth by the court, but no question was raised by appellee as to the admissibility of evidence relatng to truth.

[6]California Civil Code, Sec. 47, Subd. 2 (3) provides, in part, as follows:

"A privileged publication or broadcast is one made—* * *

"2. In any * * * (2) judicial proceeding, or (3) in any other official proceeding authorized by law; provided, that an allegation or averment contained in any pleading or affidavit filed in an action for divorce * * * shall not be a privileged publication * * * unless such pleading be verified * * * and be made without malice, by one having reasonable and probable cause for believing the truth of such allegation * * * and unless such allegation * * * be material and relevant to the issues of such action."

is urged by appellant as to why the court cited the statute, nor do we assign one except in so far as the court thought that the statutory elements of privilege in a verified cross-complaint had not been properly established, and a new trial must be had in regard to that second cause of action.

In the first case cited in the order, *Tingley v. Times Mirror Co.*, 1907, 151 Cal. 1, 26, 89 P. 1097, 1107, the California Supreme Court discusses, at the page cited, the common law pleas of justification and mitigation. It held that since the defendant had not pleaded truth, nor alleged facts which would establish truth, there was no justification for the particular libel. Further, the court held that the defendant's plea in mitigation was insufficient, because in order to establish such plea it was necessary to allege knowledge of the facts set up in mitigation prior to publication of the libel, as well as believing them true after due investigation. No such allegations were present. The court concluded that in absence of pleas of justification or in mitigation, evidence of facts bearing on knowledge or truth of the libel was inadmissible and properly excluded.

In the second case, *Davis v. Hearst,* 1911, 160 Cal. 143, 195, 116 P. 530, 552, the court discusses the common law plea of justification in regard to libel. It held that where justification was pleaded, the defendant could also plead his good faith belief of all facts within his knowledge at the time of the publication, even

if they tended to establish truth. The court also stated that circumstances in mitigation, though not pleaded by the defendant, could nevertheless be proven if they did not go to the truth of the libel. It construed *Tingley v. Times Mirror Co.,* supra, as showing a situation where the plea in mitigation must be pleaded because going to the truth of the libel. Finally, the court held as follows in regard to the particular evidence presented:

> "This evidence was offered in mitigation as tending to prove the truth of the charge * * * Therefore it could and should have been pleaded in mitigation with an allegation of the knowledge of the defendants of the fact *at the time of publication.* For there is this broad distinction between a plea in justification and evidence of the truth given in mitigation: The truth, whenever discovered, is a complete defense to the defendant. *But to repel the conception of malice in the publication only so much of the truth as the defendant knew at the time of the publication can avail him." Davis v. Hearst,* supra, 160 Cal. at page 195, 116 P. at page 552. (Emphasis supplied.)

The significance and meaning of the above cited cases is not clear. It is difficult to say unequivocally that the cases refer only to the first portion of the order, namely, granting the new trial. For the second part of the order states "* * * that in all other respects the motion for a new trial is hereby denied." It is not unlikely that the cases were intended to refer to the denial of the

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motion in respect to the first and third causes of action, where truth was pleaded as an affirmative defense. If this is so, regardless of the validity of the reasons for which the cases appear, the citations have no significance here; the first and third causes of action are not at issue. Since the cases, at the pages cited by the court, deal with the general problem of pleading and proving mitigation and justification in defamation, it is not improbable that they were intended as an explanation or authority for the two denials.

More probably, however, assuming that the cases refer to the second cause of action, they could easily refer to the proposition stated therein that in order to establish "mitigation" or good faith and lack of malice, it must be shown that the defendant knew mitigating facts "at the time of the publication." Since truth was not pleaded, only those facts known when the complaint was published would satisfy California Civil Code Section 47 requiring specifically that the allegations be made by the defendant in good faith and without malice.

As stated previously, appellant pleaded truth as an affirmative defense to the first and third causes of action. Evidence of truth was therefore admitted at the trial. However, since appellant simply pleaded privilege, and not truth, as a defense to the second cause of action, only such evidence as tended to show good faith and lack of malice at the time of publication could be considered by the trial court in determining whether

that defense had been established. It is reasonable to assume that the lower court weighed and considered the evidence of truth presented at the trial in connection with the second cause of action, but did not limit its consideration to appellant's knowledge at the time of publication. The ultimate basis for the order granting the new trial, then, would be the lack of sufficient evidence to establish good faith and lack of malice as required by statute. Insufficiency of evidence, of course, was the very ground urged by appellee in her motion, quoted above. The order, following the grounds stated in the motion, could not stem from the court's own initiative and would be timely.

At most the cited material in the order is ambiguous. It cannot be said to supply "the" reason for the court's order. If a reason must be assigned, we think the one explained above following the grounds stated in the motion is more reasonable. Indeed, it is doubtful whether such citations amount to "reasons" at all within the meaning of Rule 59(d). In any case, the order was not made on the court's own initiative, but grounded on appellee's motion for a new trial. We hold that the lower court had jurisdiction to issue its order because it was based on a timely motion. Consequently, the order is not appealable. In view of this conclusion it is unnecessary to decide whether the court had the power to grant the motion on a ground not stated therein.

The appeal is dismissed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.
No. 455

FAYE LYONS,

Petitioner,

vs.

ELSINORE C. MACHRIS GILLILAND, also known as ELSINORE MACHRIS GILLILAND,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari.

Statement of the Question Presented.

Respondent submits that under the rules of this Court the case presented is not one in which Petitioner is entitled to a Writ of Certiorari.

The only question presented is whether there is any substantial evidence to support the judgment based upon a jury verdict in favor of Respondent and against Petitioner in an action pleading an alleged libel, assertedly arising out of a cross-complaint for divorce, filed by Respondent against her husband, Ray Gilliland.

Statement of the Case.

The only issue here is: Was there, in the jury trial, evidence from which the jury could find (as it did) that Respondent's defense of privilege had been sustained? Respondent contends that the evidence was ample and this contention has been affirmed by the trial court and by the United States Court of Appeals.

The libel charged against Respondent was contained in her cross-complaint for divorce, in an action filed in the State of California. In her pleadings in said action Respondent alleged that her husband had committed adultery with Petitioner.

Petitioner brought an action against Respondent charging that said allegation was libelous. One of Respondent's defenses thereto was that said allegation was privileged under the provisions of Section 47 of the California Civil Code. Said code section reads, in pertinent part, as follows:

> "47. Privileged publication * * *: What constitutes "A privileged publication * * * is one made— * * * 2. In any * * * judicial proceeding * * *; provided, that an allegation or averment contained in any pleading * * * in an action for divorce * * * made of or concerning a person by or against whom no affirmative relief is prayed in such action shall not be a privileged publication * * * as to the person making said allegation or averment within the meaning of this section unless such pleading be verified * * * and be made without malice, by one having reasonable and probable cause for believing the truth of such allegation * * * and unless such allegation * * * be material and relevant to the issues in such action * * *."

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Verification of the cross-complaint and materiality of the allegations to the issues were admitted.

The jury's verdict was for the Respondent, upon her defense of privilege. The Petitioner appealed from the judgment entered upon said verdict to the United States Court of Appeals for the Ninth Circuit. The judgment was affirmed.

In her appeal to the said Court of Appeals, Petitioner asserted only the following two specifications of error, both of which were directed to the sufficiency of evidence, to wit: that there was insufficient evidence to justify the jury's findings (1) that Respondent acted without malice, and (2) that Respondent had reasonable and probable cause for believing the truth of the allegations.

In her statement of "Questions Presented" herein, Petitioner apparently does not contend that the evidence is insufficient to justify the jury's finding that Respondent acted without malice. Since this issue is not raised herein it is assumed that Petitioner has waived this former specification of error and, that of the original two specifications of error, there now remains only one, to wit: that there was insufficient evidence to justify the jury's findings that Respondent had reasonable and probable cause for believing the truth of said allegations. The other questions presented herein by Petitioner are new questions, presented for the first time; none of which were presented as an issue in the said District Court or the Court of Appeals.

Respondent will answer, first, the only remaining of the original specifications of error, to wit: insufficiency of the evidence. Respondent will then answer the other questions presented herein by Petitioner for the first time.

ARGUMENT.

A. Sufficiency of the Evidence.

Contrary to Petitioner's contention, the evidence is sufficient to justify the jury's findings that Respondent had reasonable and probable cause for believing the truth of said alleged libelous allegations. The record in this case sets forth the information concerning the conduct of Petitioner with Respondent's husband, that Respondent had at the time she made the alleged libelous publication. Respondent's information consisted of: (1) the written "Statement of Blanche Lampert" [Pltf. Ex. 8, Rep. Tr. p. 306, lines 11-12]; (2) the information given to Respondent by her attorney; (3) what her neighbors told her, (4) and the information Respondent obtained in conversation with the witness Blanche Lampert [Rep. Tr. p. 30, lines 6-11; p. 34, lines 1-2].

The pertinent excerpts from the written "Statement of Blanche Lampert", made on November 2, 1955, and which "Statement" was known to Respondent prior to the publication of the alleged libel, are as follows:

> "Q. How long have you worked for Mr. Gilliland? A. We were there from the 1st of May until the last of September.
>
> Q. Of this year? A. Yes, . . .
>
> Q. How often would Mr. Gilliland have guests at his home when Mrs. Gilliland was around, were they ever there alone that you know of? A. Oh, sure, he had Faye Lyons from Miami . . ." (App. Op. Br. p. 16 in Court of Appeals.)
>
> "Q. What have you observed as to women being there? A. Well, Faye Lyons.

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Q. And when was that approximately? A. Well, let's see—in May when we first went there, I will tell you how I know it was before we went on our vacation and Faye was there, he was keeping her at that time up at Paradise Valley, because I cooked a steak dinner for them, Paradise Valley Guest Ranch.

Q. Just tell us what you observed. A. He got mad at Judge Blake and Phil Kent and all of them, and he went and stayed all night up there himself.

Q. Up where? A. At Paradise Valley, when Faye was there. She used to come down and stay until two and three o'clock in the morning. They used to sit in there and drink together and we was in our own bedroom out there, they were in there until two or three o'clock in the morning, then they went on a trip and came back.

Q. Who went on a trip? A. Mr. Gilliland and Faye, I don't know where they went, but anyway when they came back they brought Faye's boy back with them and it didn't work, and they got in a fight and Ray slapped her and she throwed a glass at him, Faye broke a glass on him.

Q. After they came back with the boy did she live there at the house that you know of? A. No, she took the boy up to Paradise Valley, only she was down there every day and I baby sat with the boy, or one of the neighbors did.

Q. Until what hour of the morning? A. Until two or three o'clock.

B. L.

Q. Was she intoxicated? A. Sure.

B. L.

~~Q. Both of them? A. Sure.~~

Q. Any other instances? A. Yes, then—

Q. Now, before we get away from here, what period of time would you say approximately that this woman was involved? A. Oh, from May until I would say June, she was here most of the summer . . ." (App. Op. Br. pp. 17, 18, 19 in Court of Appeals.)

At the trial in the District Court, Mrs. Lampert as a witness testified and she corroborated her written statement, including the excerpts above quoted. In summary she testified: that the Paradise Valley Guest Ranch was a form of motel near Gilliland's home [Rep. Tr. p. 217, lines 11 to 18]; that the trip that Petitioner and Gilliland took together was from Scottsdale, Arizona to Miami, Florida [Rep. Tr. p. 218, lines 1-3]; that Gilliland and Petitioner were alone at Gilliland's home almost every night until 2 or 3 o'clock in the morning and that she saw them drinking together [Rep. Tr. p. 220, lines 11-13]; that Gilliland stayed with Petitioner all night at the Paradise Valley Guest Ranch [Rep. Tr. p. 221, line 3, to p. 222, line 6]; that she saw him come out of Faye Lyons' room about 8 o'clock the next morning [Rep. Tr. p. 222, lines 1-6]; that Petitioner had a fight with Gilliland and threw a glass at him [Rep. Tr. p. 222, line 7, to p. 223, line 20]; that Gilliland boasted of his affairs with women and said that he wouldn't have them around if he "couldn't do anything" . . . he "wanted with them" [Rep. Tr. p. 225, line 18]; that Gilliland had affairs with other women (which showed Gilliland's propensities to the adultery charge) [Rep. Tr. p. 229, line 12, to p. 233, line 20]; that the witness saw Gilliland kissing Faye Lyons two or three times

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[Rep. Tr. p. 234, lines 4-6]. She also testified that she told Mr. Murphey, Respondent's attorney, about the girls who stayed with Gilliland and what they did and all of the other facts she had related in the trial as a witness [Rep. Tr. p. 235, lines 4-7].

Mr. William L. Murphey, the said lawyer representing Respondent, Mrs. Gilliland, in said divorce proceedings, and also a witness at the trial in this action, talked to the witness, Blanche Lampert, in 1955, and at that time the witness, Blanche Lampert, told Mr. Murphey in substance what she later testified to at the trial [Rep. Tr. p. 268, line 16, to p. 269, line 25]. Mr. Murphey related all of these facts to Respondent [Rep. Tr. p. 271, line 25, to p. 272, line 11]; and he gave Respondent his opinion relative to the inferences that could be drawn from these acts of Gilliland. Prior to the alleged libelous publication Mr. Murphey advised his client, the Respondent, that in his opinion, the above described acts and conduct of Gilliland and Petitioner were of such gravity as to constitute sufficient grounds upon which to charge adultery [Rep. Tr. p. 275, line 17, to p. 277, line 6].

Respondent, Mrs. Gilliland, testified that the information she had, concerning the conduct of her husband with Petitioner, at the time of making the alleged libelous publication in her said divorce cross-complaint, came from the witness Blanche Lampert and from her attorney, Mr. Murphey, and her Scottsdale neighbors [Rep. Tr. p. 299, line 22, to p. 300, line 11].

The jury was properly instructed by the District Court as to the law relative to a privileged publication. As the judges of the weight of the evidence, the

jury determined that from all of the information Respondent had at the time of the alleged libelous publication, she had reasonable and probable cause for believing the truth of her allegation that her husband, Ray Gilliland, committed adultery with the Petitioner. This finding by the jury has substantial evidence in its support. *Peterson v. Exum* (1960, 9th Cir.), 283 F. 2d 499, 502.

B. Other Questions Presented by Petitioner.

In her Petition for Certiorari, Petitioner sets forth in her Statement of the Case, eleven "Questions Presented."

Questions numbered 1, 2, 3, 9, 10 and 11, are questions pertaining to the sufficiency of the evidence. They have already been answered in this Brief.

The other questions in the Petition are for the first time presented in this litigation. They were neither presented nor argued in the District Court, at the trial, or on the motion for a new trial. They were not presented in the specifications of error taken to the United States Court of Appeals. These questions now will be answered in the order presented in the Petition for Writ of Certiorari.

Question No. 4, is whether the law of the State of California, as set forth in Section 47, of the Civil Code of said State, governs this case.

Because the basic right of free speech is guaranteed to all citizens, by the First Amendment to the Constitution of the United States, Petitioner's action for damages, for an alleged libel, perforce had to be, and was, based on the California Civil Code, Sections 45 and 47.

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To constitute a libel which is actionable, it must be a, "false and unprivileged" publication (California Civil Code, Sec. 45).

Under and subject to these statutes, Petitioner sued Respondent and had her day in court; in both the District Court and in the Court of Appeals, according to due process of law.

Petitioner failed to establish her case. Respondent established her defense of privilege.

Question No. 5, is whether the law of the case was established in the prior and first appeal in this action? The decision of the United States Court of Appeals, in said first appeal, to which Petitioner refers (*Gilliland v. Lyons,* 278 F. 2d 56) had before it the single question of whether or not the District Court had jurisdiction to grant the motion for a new trial. In this first appeal, the United States Court of Appeals did not pass upon the merits of the case. The Appellate Court decided only that the District Court had jurisdiction to grant the motion for a new trial. It was in the new trial of said action, this time before a jury, that judgment in the present case resulted. Before the said second trial, an amended answer was filed alleging truth of the allegations, and additional evidence was introduced thereon at the second trial.

Question No. 6, is "whether the Rule of *Erie v. Tompkins,* 304 U. S. 64; 82 L. ed. 1188, is binding in this case and requires the federal court to apply the law of the State of California as construed by the highest courts of that State."

This is exactly what the United States Court of Appeals did.

The facts in *Erie v. Tompkins,* do not in any way affect the judgment entered upon the jury's verdict in this case.

Question No. 7, is whether or not Petitioner was denied due process of law and equal protection of the laws, guaranteed by the Fourteenth Amendment of the Constitution, where the accusation of adultery was found to be privileged even if not true.

Under the law of the State of California the publication must be both *false and unprivileged* in order to constitute a libel (Civil Code of California, Sections 45 and 47). Privilege is a complete defense and if established (as it was in this case) the truth or falsity of the charge is immaterial. Truth and privilege are separate and distinct defenses. Under the law the District Court had jurisdiction to find that the publication was privileged without considering or making any finding as to its truth or falsity (*Snively v. Record Publishing Company,* 185 Cal. 565, 574; *Freeman v. Mills,* 97 Cal. App. 2d 161). The jury found, under the facts, privilege had been established.

Question No. 8, also pertains to Section 47 of the Civil Code of California. Petitioner contends it denies her due process of law and the equal protection of the laws, guaranteed by the Fourteenth Amendment of the Constitution of the United States.

On the contrary, it is this section of said California Civil Code that gave Petitioner the right to bring a libel action, based on allegations made in a prior civil action for divorce. Without the exception contained in the Code, the said allegation, under the law, would be privileged. Instead of violating due process of law

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and the equal protection of the laws as guaranteed by the Fourteenth Amendment of the Constitution of the United States, it was this Civil Code section 47, that gave Petitioner her day in court.

In Question No. 10, Petitioner contends that the Opinion of the Court of Appeals is based upon an erroneous statement of fact. This contention apparently is made because of a misunderstanding or a misreading of the Opinion of said Court. The Court, in its Opinion, referring to the conduct of Ray Gilliland with Petitioner, quoted the following language:

> "Stayed with Appellant all night at the Paradise Valley Guest Ranch."

Petitioner argues that this was taken from the Blanche Lampert statement. Petitioner is in error. The language was taken from the Respondent's (Appellee's) Brief in the Court of Appeals, page 14, wherein the following statement is made:

> "That Gilliland stayed with Appellant all night at the Paradise Valley Guest Ranch."

The Court's statement is true, and the accuracy thereof is found in the following excerpts from the record of the testimony of Blanche Lampert [Rep. Tr. p. 221, line 3, to p. 222, line 6]:

> "Q. By Mr. Wolfe: Now, do you know of any incident where Faye Lyons, as to your own knowledge, stayed with Mr. Gilliland at the Paradise Valley Ranch House? * * * A. Yes.
>
> Q. By Mr. Wolfe: When was that? A. When I first went there.
>
> Q. All right. Will you describe what happened? A. Well, Judge Blake and his wife and

Phil Kent and his wife and Faye and Mr. Gilliland had a steak dinner at the Gilliland Home. And Mr. Gilliland got very obnoxious, and Faye asked him to take her home to the Paradise Guest Ranch. And he did. And he didn't come back.

Q. Do you know of your own knowledge that he didn't come back to the house that night? A. Yes.

Q. Did you see him the next morning? A. Yes.

Q. Was he driving a car at that time? A. No, not right at the time.

Q. Did you see from where he came? A. Yes.

Q. Where did he come from? A. Faye's room.

Q. And where was that? A. Paradise Valley Guest Ranch.

Q. About what time of the morning? A. About a quarter to 8:00. * * *"

The Court of Appeals was quoting the statement made in the Respondent's (Appellee's) Brief as supported by the foregoing record.

Answer to Petitioners Statement re First Appeal.

In further support of her Petition herein, Petitioner quotes from the Opinion of the Court of Appeals, in the first appeal, inferring that the said Court stated as the law of the case that there was not sufficient evidence of good faith and lack of malice, as required by the statute to establish the defense of privilege. This, however, does not appear from the Court's Opinion in that appeal. The only thing involved in

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the Opinion in said first appeal, was the question of the jurisdiction of the District Court to grant the motion for a new trial. The Court of Appeals held that the District Court did have jurisdiction. The quotation set forth in the Petition for Writ of Certiorari is taken out of context. What the Court actually said in that particular paragraph was as follows:

> "It is reasonable to assume that the lower court weighed and considered the evidence of truth presented at the trial in connection with the second cause of action, but did not limit its consideration to Appellant's knowledge at the time of publication. The ultimate basis for the order granting the new trial, then, would be the lack of sufficient evidence to establish good faith and lack of malice as required by statute. Insufficiency of evidence, of course, was the very ground urged by Appellee in her motion, quoted above. The order, following the grounds stated in the motion, could not stem from the court's own initiative and would be timely."

The Court was not passing upon the merits. It was assuming that the lower court did or did not do certain things, and under such an assumption it held that the granting of the motion was within the jurisdiction of the Court.

Petitioner's Reasons for Granting Writ Are Insufficient.

Petitioner sets forth under the heading, "Reasons for Granting The Writ," three different contentions.

Petitioner's first reason is, that the Opinion of the United States Court of Appeals is at variance with the law of the State of California, which holds that only matters known to the libelant at time of the libel are available in the defense of privilege. Respondent hereinbefore has fully answered this contention of the Petitioner and has set forth a statement of information and matters known to Respondent, at the time of the alleged libel, and which the jury found were sufficient to support Respondent's defense of privilege.

The Court of Appeals did not, as Petitioner contends, hold that "matters learned later and after the libel," were available to Respondent in her defense. On the contrary, the Court of Appeals specifically stated that, "Only evidence known by Appellee [the Respondent here] at the time of publication can be now considered." (*Lyons v. Gilliland,* 303 F. 2d 452-453.) In view of this statement of the law, it is obvious the Court followed it.

For her second reason, the Petitioner asserts that the United States Court of Appeals ". . . erroneously holds that proof of propensity by one only of the parties, plus opportunity, will support a legal inference of adultery." Respondent respectfully submits that the United States Court of Appeals made no such statement. The issue of propensity was irrelevant. On the appeal there was no issue or question of the truth or falsity of the charge of adultery. The only issue

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upon the appeal was the sufficiency of the evidence to establish the defense of privilege. However, if propensity was relevant, the record of the evidence pertaining to the Petitioner's association with Respondent's husband, Ray Gilliland, contained proof pertinent to her propensity for the conduct involved. For example, such testimony as: she admitted that she stayed overnight in a hotel with Ray Gilliland in rooms that had connecting doors [Rep. Tr. p. 75, lines 5-11, and p. 79, lines 8-16]; she testified, "that it didn't make any difference * * * whether the rooms in the motels and hotels," that she and Mr. Gilliland occupied had interconnecting doors or not [Rep. Tr. p. 120, lines 11-17]; that she took an automobile trip with Gilliland from Scottsdale, Arizona to Miami, Florida, of from seven to ten days, and they stayed overnight in the same hotels and motels along the way, the names of most of which she could not remember [Rep. Tr. p. 75, lines 5-11; p. 77, lines 10-19; p. 80, lines 8-20; p. 84, lines 7-19; and p. 91, line 8, to p. 93, line 11].

Petitioner testified she did not know how they registered at the Fort Worth Hilton Hotel [Rep. Tr. p. 83, lines 5-10].

There was evidence that Petitioner permitted Gilliland to stay all night with her in her room at the Paradise Valley Guest Ranch [Rep. Tr. p. 221, line 3, to p. 222, line 6].

There was evidence that she accepted money from Gilliland [Rep. Tr. p. 227, line 13, to p. 228, line 20]; also an airplane ticket [Rep. Tr. p. 102, lines 16-18].

This evidence and additional evidence of similar conduct goes directly to the establishment of "propensity" on the part of Petitioner.

For her third reason, Petitioner contends that the United States Court of Appeals acted under a mistake of fact. In support of this contention Petitioner states that the Court, in its Opinion, purports to quote from the Blanche Lampert statement, as follows: "stayed with Appellant all night at Paradise Valley Guest Ranch." The Court of Appeals in its Opinion stated that Petitioner and Gilliland stayed all night together at the Paradise Valley Guest Ranch. As shown hereinabove, the Court, however, did not purport to quote from the Blanche Lampert statement. The accuracy of the quotation is fully supported by the Reporter's Transcript [Rep. Tr. p. 221, line 3, to p. 222, line 6].

Petitioner says that the words of Blanche Lampert's statement were actually "stayed at Paradise Valley Guest Ranch when Appellant was there," and concludes that the Court of Appeals had misquoted from the statement of said witness. Petitioner has misread and misunderstood the Opinion of the Court of Appeals.

Petitioner further states in her Petition that: "Three times in the decision of the Court of Appeals there is quoted evidence which was not known to the libelant at the time of the libel and that this evidence, not known to the libelant at the time of the libel, is quoted as a basis for and in support of its decision on the issue of privilege." As has already been pointed out, the United States Court of Appeals did not quote evidence not known to Respondent at the time of the alleged libel in support of her defense of privilege, and did not misquote any of the testimony of the witnesses. The pertinent evidence of the facts known to

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Respondent is hereinabove set forth in detail. These facts were more than sufficient to support the finding of the jury that Respondent had reasonable and probable cause to believe the truth of her allegations in her action for divorce.

Conclusion.

Petitioner has failed to present any reason why a Writ of Certiorari should issue.

Respectfully submitted

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IN THE

Supreme Court of the United States

October Term, 1962

No. 455

FAYE LYONS,
Appellant,
vs.
ELSINORE C. MACHRIS GILLILAND, also known as ELSINORE MACHRIS GILLILAND,
Appellee.

PETITIONER'S REPLY TO APPELLEE'S OPPOSITION BRIEF

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The decision of the Circuit Court below is in conflict with this court's decision in *Erie v. Tompkins,* 304 U.S. 64; 82 L. ed. 1188 that the laws of the State and the highest court of California must apply. (Section 47(2) Civil Code of California), *Davis v. Hearst,* 160 Cal. 143, *MacLeod v. Tribune Publishing Co.,* 52 Cal. 536, 552. This court must therefore grant certiorari to correct the error of the court below in its

failure to apply California law to the facts of this case.

Wichita Royalty Co. v. City National Bank, 306 U.S. 103, 106;
Waialua Agricultural Co. v. Christian, 305 U.S. 111;
Ruhlin v. New York L. Ins. Co., 302 U.S. 681.

The Circuit Court, while stating the California law as to privilege, did not apply it. Neither has appellee. Both have made the error of which we complain and which alters the established law of California.

The defense of privilege in California must be based upon only those facts *known* to the libelant at the time the libelous and untruthful pleading charging adultery was filed. (Section 47(2) Civil Code of California) *Davis v. Hearst,* 160 Cal. 143. The privilege is lost if the publication is motivated by hatred or ill will toward plaintiff. *Brewer v. Second Baptist Church,* 32 Cal. (2) 791, 797.

Both the Circuit court and appellee change this rule to hold that matters presented in the trial six years later may be relied on as a defense, even though not relied on at the time the libel was committed.

The vice permeates the massive response of appelle. Appellee goes to the testimony given in the trial six years later and set up in the trial transcript for evidence to support the defense of privilege in the

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false publication and libel committed by the appellee six years before in the false filing of an accusation of adultery in 1955.

Not what was developed at the *trial,* but only what appellee knew at the time of the committing of the libel is available on this issue under California law.

> 47(2) *Civil Code of California;*
> *Davis v. Hearst,* 160 Cal. 143.

Like probable cause for a search without a warrant under the Fourth Amendment, it is not made legal by what it turns up.

> *Silverthorne Lumber Co. v. U.S.,* 251 U.S. 385;
> *Schiller v. U.S.,* 9 Cir. 35 F. (2) 865;
> *U.S. v. Roberts,* 90 F. Supp. 718;
> *U.S. v. Hinton,* 219 F. (2) 324.

Although the rule is correctly *stated* in the opinion sought to be reviewed herein (p. 2 Opinion) but the learned United States Court of Appeals, after correctly stating the law, proceeded forthwith to disobey it, and disregard it. Certiorari is therefore necessary to correct this conflict and failure to follow California law.

> *Erie v. Tompkins,* 304 U.S. 64;
> *Waialua Agricultural Co. v. Christian,* 305 U.S. 111.

That appellee followed the same error is the outstanding vice of her Opposition Brief. Twenty-three

times in her Opposition Brief respondent went to the trial transcript for evidence in the trial six years later to substantiate the issue of privilege (pp. 6, 7, 11, 15, 16 Res. Opp. Br.) at the time of filing the libelous pleading. Unless evidence given at the trial was known to respondent at the time of the libel, it is not available to respondent on the issue of privilege. This was not established.

It should be remembered that on the issue of truth the jury found the libel of having committed adultery to be untrue (Tr. p. 21).

The United States Court of Appeals, in paragraph five, page two, sets forth what respondent knew at the time of the libel as follows:

(1) The Blanche Lampert statement. (Exhibit 1)
(2) What her attorney, Murphy, told her.
(3) What neighbors told her.

What her attorney told her and what neighbors told her went to the issue of "truth" of the libel only and involved evidence tending to show the propensity "at large" of the husband. *None of this was connected to petitioner.*

As to petitioner and bearing on the issue of the defense of "privilege" *the Blanche Lampert statement* stands alone.

Respondent testified as follows:

"Q. Isn't it a fact Mrs. Gilliland, that you had no information other than the information given you by Blanche Lampert when you accused Faye Lyons and Miss Meyers of adultery with your husband?

"A. That's right." (Rep. Tr. p. 307-8)

Respondent augments the statement of Blanche Lampert which contained all she knew at the time of the libel in 1955 by the testimony of Blanche Lampert at the trial *in 1961* to amplify the evidence on the issue of privilege.

The learned United States Court of Appeals based its decision on the same error. Contrary to the laws of the State of California.

It also based its decision on a misstatement of the evidence.

On page two, paragraph five, the United States Court of Appeals identified the Blanch Lampert statement and proceeded to give purported evidence therefrom which was held to be sufficient to establish the defense of privilege.

Among the instances purporting to emanate from that legal source and in quotation marks is the following damaging statement concerning petitioner, to-wit:

> . . . that on the one occasion Mr. Gilliland "stayed with appellant all night at the Paradise Valley Guest Ranch."

The true quotation from the Blanche Lampert statement was:

> "He (Mr. Gilliland) got mad at Judge Blake and Phil Kent and went and stayed all night up there himself.
>
> Q. Up where?
>
> A. At Paradise Valley, when Faye was there."

We urge again the distinction between *staying all night with a certain woman* in a hotel and *staying all night in a hotel while a certain woman was registered there.*

This court will not allow a decision to stand which is based on an erroneous statement of facts, to do so would be to let justice miscarry on a false basis. This court will preserve the purity of its courts.

Sorrells v. U.S., 287 U.S. 435;
Olmsrad v. U.S., 277 U.S. 438, 72 L. Ed. 944.

LAW OF STATE NOT APPLIED

Next the learned United States Court of Appeals violates its own opinion that on the issue of privilege only what was known by the respondent at the *time* of the libel can be considered, by basing its opinion on two matters not known at the time of the libel but testified to six years later at the trial, to-wit:

(1) "that the two kissed on several occasions."
(2) "that appellant and Mr. Gilliland took a ten day automobile trip from Scottsdale, Arizona to Miami, Florida, together."

Neither of these statements is to be found in the Blanche Lampert statement nor were they a part of what her attorney, Mr. Murphy, told respondent nor a part of what neighbors told her. They constitute statements out of context of testimony given six years after the libelous false charge of adultery was filed and only given at the time of trial.

If ever a court's opinions require review to correct misstatements of fact baldly asserted therein and to eliminate application of conflicts of law with that of California inherent therein, this case belongs to that class.

If this opinion is allowed to stand, *Davis v. Hearst*, supra, stands repealed, by federal decision, contrary to *Erie v. Tompkins*, at least so far as the federal courts are concerned.

If this opinion is allowed to stand, the precedent for a new technique will be established wherein a court will be upheld if it states the correct legal principle even though it violates that same principle in its application to the facts and in the judgment.

If this opinion is allowed to stand, a new rule contrary to established jurisprudence will be promulgated to the effect that when adultery is sought to be proved or probable cause of it is sought to be established by indirect evidence, "propensity" on the part of one only of the parties will suffice and the present rule that "propensity" of *both* is required will vanish from the law.

This presents an important question of the law of libel which has not been, but should be resolved by this court.

CONCLUSION

It is respectfully urged that the writ of certiorari prayed for may issue, and the judgment of the court below reversed.

Respectfully submitted,

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and
WELBURN MAYOCK,
Attorneys for Appellant.